No. 78-1639

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN E. MORRISON, JR., ET AL., PETITIONERS

v.

JOHN C. STETSON, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the Air Force violated 50 U.S.C. App. (1970 ed.) 454(*l*)(1) in ordering them to active duty for four years rather than for two years.

1. Petitioners are United States Air Force medical officers who, during 1966 and 1967, while undergraduates, enrolled in the Air Force Reserve Officers Training Corps (AFROTC) (Pet. App. A-4). Each signed a contract with the Air Force which, in exchange for financial assistance, obligated him to serve four years' active duty if he was commissioned as an officer. Each agreement provided that the signer might be permitted to delay active duty pending completion of professional studies. The agreements contained no provision that such delay would in any way alter the four-year commitment (*ibid.*).

On completion of the AFROTC program, each petitioner was appointed a second lieutenant in the Air Force Reserve (Pet. App. A-4). Each petitioner applied for and was granted delay of active duty in order to study medicine (*id.* at A-6). After completing his studies, each petitioner became eligible under Air Force regulations to be commissioned a medical officer. Each petitioner accepted his commission and each was appointed a first lieutenant in the medical corps. The appointment orders stated that the earlier appointments as second lieutenant line officers were "vacated." In 1975 and 1976 each petitioner was ordered to serve four years' active duty (*ibid.*)

In 1977 petitioners filed an action in the United States District Court for the District of Columbia, alleging that their orders to four years' active duty violated 50 U.S.C. App. (1970 ed.) 454(*l*)(1).[1] That statute provided the President with the authority to order to active duty for a maximum of two years physicians under the age of 35 who are members of the reserve components of the Armed Forces. Petitioners also argued that because their original appointments had been vacated on their appointment to the medical corps, they were no longer obligated to serve their four-year commitments.

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[1] 50 U.S.C. App. (1970 ed.) 454(*l*)(1) provided in pertinent part:

> The President may order to active duty * * * for a period of not more than twenty-four consecutive months, with or without his consent, any member of a reserve component of the Armed Forces of the United States who is in a medical, dental, or allied specialist category, who has not attained the thirty-fifth anniversary of the date of his birth, and has not performed at least one year of active duty (other than for training).

All parties moved for summary judgment. In a thorough opinion on which we rely, the district court granted judgment to the Air Force (Pet. App. A-2 to A-17). The court found that there was no evidence to support petitioners' assertion that the Air Force by its actions intended to rescind the four-year obligation that petitioners had originally assumed (Pet. App. A-8, A-9). The court further concluded that Air Force regulations in force at the time of petitioners' medical appointments stated that persons in petitioners' circumstances would be held to their four-year commitments (*id.* at A-10, A-11). Moreover, Air Force policy was that medical officers such as petitioners retained their four-year AFROTC obligations (*id.* at A-11).

The court also rejected petitioners' argument based on 50 U.S.C. App. (1970 ed.) 454. The court held that, read in context and in light of its legislative history, that statute did not apply petitioners (Pet. App. A-12 to A-17). It therefore rejected petitioners' claim that their four-year active duty obligations were rescinded by the statute, and it granted summary judgment in favor of respondent (*id.* at A-17).

The court of appeals affirmed, relying on the district court's opinion (Pet. App. A-1 to A-2).

2. The decision of the lower courts is correct and does not conflict with any decision of this Court or any Court of Appeals. As the district court found, the Air Force never had any intention of modifying the four-year obligation that petitioners assumed in exchange for government assistance. On the contrary, applicable Air Force regulations and policy stated that those in

petitioners' position would be held to their original obligations when their delays for professional training had expired (Pet. App. A-10 to A-11).[2]

The court's conclusion concerning 50 U.S.C. App. (1970 ed.) 454(*l*)(1) also is correct. The Senate Report (S. Rep. No. 411, 85th Cong., 1st Sess. (1957)) explains without ambiguity that this statute was not intended to affect persons who, like petitioners, had an independent obligation to serve on active duty. Moreover, the statute expired by its terms on July 1, 1973, before petitioners received their commissions. See Act of June 27, 1957, Pub. L. No. 85-62, Sections 2, 9, 71 Stat. 206, 208, as amended by the Act of Sept. 28, 1971, Pub. L. No. 92-129, Section 103, 85 Stat. 355. It therefore had no effect on their cases, and its interpretation does not present any question of continuing importance.

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[2]Petitioners rely on a 1963 Air Force message, which stated that later appointment to a medical position abrogated the four-year AFROTC obligation (Pet. 10). This message was purportedly based on the provisions of the Act of Apr. 30, 1956, Pub. L. No. 84-497, 70 Stat. 119, which was passed to "increase the attractiveness of a service career for medical and dental officers." H.R. Rep. No. 1806, 84th Cong., 2d Sess. 1 (1956). After further study, however, the Air Force circulated a message in 1964 which clearly stated that the four-year obligation remained and was not abrogated (see Exhibit Volume To Court of Appeals Appendix 150, 151). Petitioners did not enroll in the AFROTC until 1966 and 1967, and thus they are in no position to claim an advantage under the 1963 message. In 1967, before any petitioner requested a delay of active duty to attend medical school, the Air Force Director of Medical Staffing and Education wrote to the Chief of Staff that Pub. L. No. 84-497 did not affect the four-year commitment that petitioners had accepted, and that appointment of a newly graduated physician to the medical corps did not remove the four-year service obligation (See Exhibit Volume 149).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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